Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

MELINDA SEELY,
Petitioner,

v.

MARVIN G. RUNYON, Post Master General,
United States Postal Service,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an "adverse employment action" must be an action which "materially effects the terms and conditions of employment in every Title VII case, or whether in cases such as sexual harassment and sexual discrimination the term should be construed more broadly under 42 U.S.C. 2000e-2(a)(1),(2)?

2. Whether the United States Court of Appeals for the 10th Circuit entered its decision in this case in direct conflict with its own opinion in Jeffries v. Kansas, 147 F.3d 1220, (10th Cir. 1998)?

PARTIES TO THE PROCEEDING

MELINDA SEELY,

Petitioner,

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MARVIN G. RUNYON, Post Master General,
United States Postal Service,

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OPINIONS BELOW

The United States Court of Appeals for the Tenth Circuit issued its unpublished opinion on December 14, 1998. A copy of the opinion is included in the appendix at pages 4a-10a. (App. B at 4a-10a). The United States District Court for the Central Division of Utah ordered entry of the final judgment on May 28, 1997. A copy of the final judgment is printed in the appendix at page 1a-3a. (App. A at 1a-3a).

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its Order and Judgment on December 14, 1998. This Petition for Writ of Certiorari is being filed within 90 days of that Order and Judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §2000(e)-2 (App. D).

29 U.S.C. §623 (App. E).

STATEMENT OF THE CASE

This case involves a former U.S. Postmaster who had enjoyed a 26 year career with the United States Post Office before voluntarily retiring under severe distress, on October 2, 1992, during the final hour of an early retirement option program.

Prior to her retirement, Seely, had enjoyed an exemplary career with the Postal Service, working her way up from distribution clerk to EAS Level-20 Postmaster, Magna, Utah. Seely's career with the Postal Service began in 1965 when she was hired as a distribution clerk in Salt Lake City, Utah. During the period of 1965 through 1974, Seely held numerous clerical positions in the Post Office, including cost analyst and personnel clerk.

In 1974 Seely became the Ad Hoc Women's Program Coordinator and she served on the EEO committee. In 1976 Seely was promoted to 204B, an acting supervisor position. She held that position until 1978 when she was again promoted, this time to Superintendent of Window Services. Seely held the position of Superintendent of Window Services until 1979 when she was assigned as Women's Program Coordinator. During her tenure as Women's Program Coordinator, Seely was detailed out to other offices, first, for approximately 3 months as Officer in Charge in Pleasant Grove, Utah, and second, as an auditor of first class offices throughout the Salt Lake Management Sectional Center ("MSC").

Seely's next promotion came in 1981, when she was assigned as Postmaster, EAS Level-18, in Lehi, Utah. Seely successfully held the position of Postmaster in Lehi for five (5) years. During her employment as Lehi Postmaster, Seely

was responsible for the total management of a small "city delivery" post office. During Seely's third year in Lehi, she began receiving letters of warning from the Salt Lake MSC, indicating that her office was over budget. Despite the warnings, and the fact that Seely's office was in fact over budget, Seely's belief that she was doing a good job as Postmaster in Lehi, was reaffirmed when she received a "Very Good" employment evaluation for that year.

In 1987 Seely was selected, from a pool of candidates throughout the United States, as a Management Training Instructor at the Centerfield Academy. Seely's acceptance of the promotion to Management Training Instructor came with great personal sacrifice, because Seely's husband and children would not be accompanying her to Memphis, Tennessee for the three year term of her assignment. Despite the incredible hardship of leaving her family for three long years, Seely was determined to advance her career with the Postal Service and felt that she needed such an assignment before she would be considered for further promotion in the Salt Lake MSC.

Seely's contract with the Centerfield Academy included a promotion to EAS Level-20 upon her return to Salt Lake City. In addition, Seely was promised an extensive training program to reacquaint herself with Salt Lake MSC upon her return to Salt Lake.

While at the Centerfield Academy, Seely was responsible for training postmasters through EAS Level-18. Because Seely was responsible for training postmasters regarding proper procedures and protocol in the Postal Service, she became intimately familiar with all aspects of the position of postmaster. Of particular importance to this case was Seely's expertise in the Management Training on proper counting of mail volume, because her reports of improper

mail counting in the Salt Lake MSC would eventually cost her her career with the U.S. Postal Service.

Upon returning to Salt Lake City, instead of the training assignment she was promised, Seely was given an assignment as an EAS Level-20 Postmaster in Magna, Utah. In Magna Post Office, Seely was immediately confronted with internal problems too numerous to describe here. The most significant problem Seely confronted within her first couple of months in Magna, however, was the fact that the mail volumes were being inflated. The practice of inflating mail volume in Magna, prior to Seely's appointment there, artificially exaggerated the amount of business flowing through the Magna Post Office, which theoretically inflated the budgetary needs for the entire Salt Lake MSC. It was Seely's reporting of this illegal practice that Seely believes caused her to become a target for removal by her two new male managers, Misner and Prentiss. In fact, after reporting the discovery Seely, expecting praise and encouragement, was instead met with threats, unsatisfactory employment evaluations and removal from her post. At the end of Fiscal Year 1991, just as they promised, Misner and Prentiss issued Seely the first "unsatisfactory" employment appraisal of her career with the Postal Service.

After issuing the "unsatisfactory" evaluation, Prentiss and Misner failed to follow postal service instruction, requiring that a postmaster be retrained immediately following an unsatisfactory appraisal. In fact, instead of providing Seely with immediate retraining, Misner did not contact her again for several months. At that time, Misner summoned Seely to his office for what he described as a "career planning" meeting. During the meeting Misner told Seely that he wanted her to step down and that he had a Level-15 position in mind for her. Misner also told Seely that

if she refused he would find a way to remove her from her office in any event.

Terribly upset after the meeting, Seely contacted a post office union representative, Ted Carrico, who assured her that he would be in Salt Lake City the following week and would meet with Misner to discuss the situation. After his meeting with Misner, Carrico contacted Seely and told her that he had indeed discussed his concerns with Misner and that he had instructed Misner that he could not simply remove a postmaster from office with an "unsatisfactory" evaluation. Carrico told Misner that he would have to provide Seely with retraining before removing her from her post.

Immediately thereafter, Misner devised an unprecedented "retraining" program which required that Seely leave her post in Magna, albeit temporarily, and spend the following ninety (90) days in other offices, with other postmasters throughout the Salt Lake MSC, none of whom were certified trainers of postmasters. They were male managers whose management style Misner apparently admired.

In the interest of space herein, few of the facts concerning the harassment and intimidation which Seely endured during the period after her return from Memphis in 1990 until she tendered her resignation in October of 1992 can be described. However, the fact is that when Seely did finally tender her resignation on October 2, 1992, she was suffering from severe emotional distress and anxiety because of the treatment she received at the hands of Misner and Prentiss. Seely's retirement from the Postal Service was not voluntary as has been asserted. Seely did not retire on October 2, 1992, and in fact, she continues to work at the job she took after she left the Postal Service to this day. Seely

left the Postal Service because the harassment and intimidation at the hands of two new male managers was more than she felt she could continue to endure, even after a twenty-six (26) year struggle to achieve a career that most women in the Salt Lake MSC could only dream about.

On May 28, 1997, the U.S. District Court for the Cental Division of Utah granted Defendant, Runyon's, Motion for Summary Judgment, noting that, "not everything that makes an employee unhappy is an actionable adverse action." Seely v. Runyon, 966 F. Supp. 1060, (Dis. Utah 1997)(citing Jeffries v. Kansan, Dep't of Social & Rehabilitation Servs., 946 F. Supp. 1556, 1567 (D. Kan. 1996). (App. A).

Seely appealed to the U.S. Court of Appeals for the Tenth Circuit on October 16, 1997 and oral argument was heard on September 17, 1998. The Court of Appeals apparently agreed with the District Court that Seely's 90 day temporary reassignment did not constitute an "adverse employment action" as required by 42 U.S.C. §2000(e)(2)(a)(1) and 29 U.S.C. §623(a)(1) because as the Court stated, "the assignment was not a demotion, there being no diminution of pay, status or benefits during the 90-day program". (App. B at 9a). Nor did the court find that, "the interplay between Seely and her supervisors leading up to her decision to take early retirement," rose to the level of an adverse employment action. (App. B at 9a), because on December 14, 1998, the U.S. Court of Appeals for the Tenth Circuit affirmed the U.S. District Court for the Central Division of Utah. (App. B).

ARGUMENT FOR GRANTING THE WRIT

There are many cases throughout the circuits which describe when, and under what circumstances, a court should find that an employee has suffered an "adverse employment action" sufficient to allow the employee to proceed with litigation and prove that he or she has been the victim of illegal discrimination in the workplace.

Those circuits which narrowly define the circumstances which rise to the level of "adverse employment actions" certainly achieve the goal of limiting litigation under 42 U.S.C. §2000(e) et seq. and 29 U.S.C. 623 et seq., however, they are not necessarily putting an end to illegal discrimination in the workplace. By narrowly defining those actions sufficient to be deemed "adverse employment actions", the Courts are enabling cleaver and litigation savvy employers to continue with their discriminatory practices, as long as they stop short of firing their employees.

Some circuits have recently taken a broader look at the issue of which actions ought to constitute "adverse employment actions", ostensibly realizing that employers oftentimes do not take the final step of firing an employee, but instead make the employee's life on the job a "living hell" with the hope that the employee will simply leave on their own. Therefore, in some circuits, employees have a better chance of proving that they have fallen victim to illegal discrimination in the workplace.

Given some of this recent analysis, particularly in the Tenth Circuit, regarding transfers, threats and "constructive discharge", the instant case provided the U.S. Court of Appeals for the Tenth Circuit sufficient facts to find that Petitioner's case did present an issue regarding "adverse

employment action" which would have precluded summary judgment and provided Petitioner with an opportunity to prove her allegations of illegal discrimination.

ARGUMENT 1

There is a disagreement among the Circuits when defining what actions, short of firing an employee, constitute "adverse employment actions" under Title VII, particularly, in situations in which the employee is transferred to another division or department, but does not necessarily lose benefits in the process. Such a conflict between the circuits requires the United States Supreme Court's definitive resolution.

The facts in the instant case are clear with respect to one issue, Petitioner was not fired from her job, she was transferred from her office in Magna, Utah and sent to three other post offices within a 90 day period on the pretext of a retraining. Because Petitioner was not fired, she had to make an objective showing that some other adverse employment action occurred, or be forever barred from demonstrating that she was treated in an illegal and discriminatory manner by two male supervisors. Therefore, the issue in the instant case, before both the U.S. District Court for the Central Division of Utah, and the U.S. Court of Appeals for the Tenth Circuit, was whether Petitioner in fact suffered an "adverse employment action." Both Courts held that she did not. Petitioner contends, however, that had this case been heard in a different circuit, or even on a different day in the Tenth Circuit, she may well have satisfied the "adverse employment action" element of her case and been permitted to proceed to trial to prove her allegations of discrimination. Petitioner also contends that the recent line of cases in the Tenth Circuit should have led the U.S. Court of Appeals for the Tenth Circuit to a different result than affirmation of the

District Court's ruling in favor of Defendant.

There is conflict among the circuit courts regarding what actions constitute "adverse employment actions," particularly where the employee has not been fired but has instead been transferred and given different responsibilities, has received unfair evaluations or has been the subject of some other action which cannot be deemed a firing, but which may have had some adverse effect on the employee anyway. There is also conflict among the circuits regarding whether different standards exist depending on the type of claim filed under Title VII, i.e., sexual harassment, sexual discrimination, retaliation or age discrimination.

Many circuits have determined that so long as the action does not effect the employees terms, privileges, duration or condition of employment, it will not be deemed an "adverse employment action."

For example, the U.S. District Court for the Southern District of New York granted defendant's summary judgment motion when, in that Court's opinion, the Plaintiff failed to show that he suffered any adverse employment action, in Johnson v. Frank, 828 F. Supp 1143 (1993 U.S.Dist.). In Johnson the Plaintiff was given an "unsatisfactory" mid-year evaluation which he believed was reprisal for his having filed several complaints with the EEOC against his employer. Johnson believed that the mid-year evaluation was sufficient to show that he suffered an "adverse employment action." The Court disagreed. Citing other decisions from the Southern District of New York, the Court determined that, "**[s]ince the mid-year evaluation did not affect the terms, privileges, duration or condition of Johnson's employment**," Plaintiff's complaint of retaliation should be dismissed by summary judgment. Id. at 1153 (emphasis

added).

In Yerdon v. Henry, 91 F.3d 370 (2nd Cir. 1996), the U.S. Court of Appeals for the Second Circuit reiterated that position regarding "adverse employment action" as, "**one that affects the terms, privileges, duration, or conditions of employment**". Id. at 377 (citing Johnson)(emphasis added).

Likewise, in Caussade v. Brown, 924 F.Supp. 693 (D.Md. 1993), the District Court found no adverse employment action when the Plaintiff was reassigned to another ward, where it was "**undisputed that she retained her title, grade, salary and benefits.**" Id. at 701(emphasis added). The Caussade court also stated, "[i]n, this case, the record is bereft of any evidence suggesting that there has been any material change in Caussade's duties or responsibilities. To the contrary, the 1993 reassignment is of a piece with Caussade's eclectic career pattern at Perry Point. Nor has plaintiff alleged any material loss of prestige or a reduced opportunity for future reassignments or salary/grade increases. A transfer or reassignment alone does not amount to adverse employment action. See Steiner v. Showboat Operating Co., 25 F.3d 1459, 1465 n.6 (9th Cir. 1994)(a transfer is barely "adverse" where employee was not demoted, or put in a worse job, or given any additional responsibilities), cert. denied, 130 L. Ed. 2d 636, 115 S. Ct. 733 (1995). Cf. Dominic v. Consolidated Edison Co. of New York, Inc., 822 F.2d. 1249, 1254-55 (2nd Cir. 1989) (employee showed adverse employment action where he was transferred to area with poor working conditions and deluged with work)." Id. (emphasis added).

The U.S. Court of Appeals for the Fifth Circuit has also used the "ultimate employment decisions" analysis when

determining whether an action by an employer rises to the level of an "adverse employment action."

For example, in Dollis v. Rubin, 77 F.3d 777 (5th Cir. 1995), the Court affirmed a summary judgment in favor of Defendant, finding that the Plaintiff failed to show that there had been an "adverse employment action". The Court declared, "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions. See Page v. Bolger, 645 F.2d 227, 233 (4th Cir.)(en banc)(noting that Title VII discrimination cases have focused upon ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating), cert. denied, 454 U.S. 892, 102 S.Ct. 388, 70 L. Ed. 2d 206 (1981). None of Dollis' administrative complaints, discussed supra, rise to the level of ultimate employment decisions. Consequently, the magistrate's grant of summary judgment as to Dollis' retaliation claims was correct." Id. at 781-782.

In 1997, the U.S. Court of Appeals for the Fifth Circuit addressed the issue of adverse employment action again in Mattern v. Eastman Kodak Company, 104 F. 3d 702, 707 (5th Cir. 1997)(cert.denied. 139 L.E.2d 260, 118 S.C. 336). In Mattern, however, the Court seemed to conclude that the "materially effect terms of employment"analysis may only apply in certain kinds of cases.

In Mattern the jury had received an instruction which included the following definition of adverse employment action:

> "[n]ow, adverse employment action could be defined as a discharge, a demotion, refusal to hire, refusal to promote, **reprimand, [or] acts of sabotage ... by employees against other employees, either condoned or directed by an employer for the purpose of establishing cause for discharge.** Mere dirty looks or reluctance of co-workers to speak to an employee are not the types of adverse employment action prohibited by Title VII. Merely placing a memorandum regarding an employee's performance in his or her personnel file does not in itself constitute an adverse employment action." Id. (emphasis added).

The Court explained that the instruction was not at issue, and in fact was consistent with its earlier definition in Dollis, stating, "[c]onsistent with the retaliation instruction, our court has stated that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decision. Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995). "Ultimate employment decisions" include acts "such as hiring, granting leave, discharging, promoting, and compensating". Id.

Despite the Court's assertions that there were no issues regarding the jury instruction given, the Court apparently found that the acts alleged by Plaintiff, i.e., the hostility from fellow employees, the stolen tools and the resulting anxiety Plaintiff suffered, did not rise to the level of "adverse employment action" because there was no evidence that the acts were condoned or directed by Defendant.

In that regard the Court declared, "[i]n addition, these acts cannot be attributed to Eastman, especially when viewed in the light of the jury's remedial action and no constructive discharge findings. Moreover, there is no proof that these acts were by management." Id. at 707.

Similarly, the Court found that the other acts alleged by Plaintiff, i.e., a highly unusual visit to Plaintiff's home by two of her supervisors , the verbal threat of being fired by supervisors, a reprimand for not being at her assigned station, a missed pay increase, and being placed on "final warning" did not constitute "adverse employment actions" because of their lack of consequence.

The Court then declared that; "[t]o hold otherwise would be to expand the definition of "adverse employment action" to include events such as disciplinary filings, supervisor's reprimands, and even poor performance by the employee -- anything which might jeopardize employment in the future. Such expansion is unwarranted. See Shitaker v. Carney, 778 F2d 216 (5th Cir. 1985) cert. denined, 479 U.S. 813, 107 S. Ct. 64, 93 L.Ed. 2d 23 (1986)(refusing to expand coverage of Title VII's anti-retaliation provision to include non-workplace hostility by non-employees).

However, the Mattern Court also seemed to be limiting its analysis to cases in which the Plaintiff was alleging retaliation. Based upon the Court's apparent agreement with the jury instruction, it might even have fashioned a different opinion on the facts alleged by Petitioner in the instant case, as evidenced by the language at page 708-709, where the Court distinguished 42 U.S.C. §2000e-3 and 42 U.S.C. §2000e-2(a)(1),(2), stating;

The import of these cases, culminating in Dollis, is the long-held rule that Title VII's anti-retaliation provision refers to ultimate employment decisions, and not to an "interlocutory or mediate" decision which can lead to an ultimate decision. Obviously, this reading is grounded in the language of Title VII. As quoted earlier, the anti-retaliation provision states that employers shall not "discriminate" against employees for taking action protected by Title VII. 42 U.S.C. @2000e-3. In defining this term, we look of course, to other Title VII sections for guidance; in this case, the preceding section is helpful. That section states, in part, that it is unlawful to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment". 42 U.S.C. @20003-2(a)(1). **This type of employer action contrasts sharply with the more vague proscription, found in the next subpart, of "limitation" of employees which deprive or "would tend to deprive" the employee of "opportunities" or "adversely affect his status".** 42 U.S.C. @2000e-2(a)(1),(2). It goes without saying that this second subpart reaches much farther than the first. It reaches acts which merely "would tend" to affect the employee; obviously, the way in which the employee may be affected in this subpart is much broader. The anti-retaliation provision speaks only of "discrimination"; there is no mention of the vague harms contemplated in

@2000e-2(a)(2). Therefore, this provision can only be read to exclude such vague harms, and to include only ultimate employment decisions. Id. (emphasis added).

In the Sixth Circuit case of Joiner v. Ohio Dep't of Transportation, 949 F.Supp. 562, the U.S. District Court for the Southern District of Ohio, Western Division, held that the Plaintiff failed to establish an adverse employment action when he alleged that he lost an opportunity at overtime, was deprived of supervisory authority, and his responsibilities were "significantly reduced". The District Court contended; "[t]hat the Plaintiff experienced some job changes is not enough to establish that he was subjected to adverse employment action. Moreover, the Plaintiff has offered no evidence to support his claims as required by Street v. J.C. Bradford & Co., 886 F.2d at 1478." Id. at 566-67.

The Joiner Court, citing Kocsis v. Multi-Care Managment, Inc., 97 F3d 876 at 885 (6th Cir. 1996), stated that; [f]or both the race discrimination and the retaliation claims, the plaintiff must show that reassignment was a "materially adverse change in the terms of [his] employment (citation omitted). "A change in the terms of employment is "materially adverse" when the plaintiff received "significantly diminished material responsibilities, " including "termination of employment, demotion evidenced by a decrease in wage or salary, less distinguished title, material loss of benefits or other indices that might be unique to a particular situation." (Citing Kocsis, 97 F.3d at 886 (citation omitted). Id. at 567.

However, the Joiner Court also recognized that given the right circumstances, even a lateral transfer could rise to the level of an "adverse employment action", explaining;

"A lateral transfer can be actionable as an "adverse employment action" if the conditions of the transfer would have been objectively intolerable to a reasonable person, thereby amounting to a constructive discharge. Darnell v. Campbell County Fiscal Court, 924 F.2d 1057, 1991 WL 11255 at *3 (6th Cir. 1991). In order to maintain an action for constructive discharge, the plaintiff must show that working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. Kocsis, 97 F.3d at 87. A lateral transfer involving a loss of prestige or an objectively demeaning change of working conditions–such as removal from a private office–can amount to constructive discharge. Darnell v. Campbell County Fiscal Court, 731 F. Supp. 1309, 1313(E.D. Ky. 1990), aff'd 924 F.2d 1057, 1991 WL 11255 (6th Cir. 1991). However, in considering whether a lateral transfer amounts to a constructive discharge, subjective considerations are insufficient, id., and therefore objective factors must be considered." Id.

In Kauffman v. Kent State University, 815 F. Supp. 1077 (1993), the U.S. District Court for the Northern District of Ohio, Eastern Division, determined that there was no issue that Plaintiff had not been subjected to adverse employment action when she alleged that such action existed when her employer failed to consider her for a promotion and failed to post and notify other employees of the same; issued her unfair, improper and discriminatory job evaluations, and

transferred her to a less desirable position.

The Court clarified; "[a]s one court within this Circuit recently commented, "the clear trend of authority is to require that a transfer with no change in wages or benefits amount to a 'constructive discharge' to be actionable as an adverse employment action." Darnell v. Campbell County Fiscal Court, 731 F. Supp. 1309, 1313 (E.D.Ky. 1990)(emphasis added), aff'd, 924 F.2d 1057 (6th Cir. 1991). This conclusion, drawn from the well-reasoned opinions of the Seventh Circuit, is premised upon the supposition that:

> "[t]he ADEA is not intended to prevent employers from changing the job responsibilities of their 40-70 year old employees. Neither is the Act intended to give 40 to 70 year old employees the right to walk out and sue their employer because they dislike their changed job responsibilities. To establish a violation of the ADEA, therefore, a plaintiff must prove that she suffered a materially adverse change in the terms and conditions of her employment because of her employer's discriminatory conduct." Id. at 1083-84.

The Court further stated however, that; "[w]e agree with the approach used by the district court. . . . An employees rejection of a lateral transfer is always actionable as an "adverse employment action" if the conditions of transfer would have been objectively intolerable to a reasonable person, thereby amounting to a "constructive discharge." In determining whether a lateral transfer would be intolerable to a reasonable person, the following non-exhaustive list of factors have been considered: increased distance from home to new position, decrease in salary, grade

level or benefits, and changes in job duties and/or responsibilities." Id. at 1085 (citing Darnell v. Campbell County Fiscal Court, 1991 U.S. App. LEXIS 1755, at 7-8 (6th Cir. 1991)(citations omitted).

On the other hand, the Seventh Circuit has continually broadened its analysis regarding "adverse employment action" in cases in which the Plaintiff has been transferred.

For example, in Crady v. Liberty National Bank and Trust Company of Indiana, 993 F.2d 132 (7th Cir. 1993), the U.S. Court of Appeals reasoned that although Plaintiff's factual dispute did not meet its criteria of an "adverse employment action" (he had been transferred to a different sales territory), a material adverse change might be evidenced by actions falling short of termination. The Court remarked that; "[a] material adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." Id. at 136.

Similarly, in Flaherty v. Gas Research Institute, 31 F.3d 451 (7th Cir. 1994), another transfer case, the Court had this to say;

> "We wish to emphasize, however, that an employer does not insulate itself from liability for discrimination simply by offering a transfer at the same salary and benefits. Indeed, we observed in Collins v. State of Illinois, 830 F.2d 692, 703 (7th Cir. 1987) that other courts have found adverse employment actions in the following circumstances where salary and

benefit levels were retained: "in a employer's moving an employee's office to an undesirable location, transferring an employee to an isolated corner of the workplace, and requiring an employee to relocate her personal files while forbidding her to use the firm's stationary and support services." (Citing cases). Collins itself found an adverse employment action under Title VII where a library employee had been transferred to a new department but her supervisors were unsure of her new responsibilities, she was largely relegated to reference rather than consulting work, and she had lost her office and telephone. Id. at 704; see also McCabe v. Sharrett, 12 F.3d 1558, 1564 (11th Cir. 1994)(employee suffered adverse job action where she had fewer responsibilities, was made to perform more menial tasks, and had lesser opportunity for salary increases in her new position.)" Id. at 456-57.

In 1996, the U.S. Court of Appeals for the Seventh Circuit reiterated their position in Williams v. Bristol-Myers Squibb Company, 85 F.3d 270 (7th Cir. 1996) reasoning that;

"[o]bviously a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either." Id. at 274. (citing Flaherty v. Gas Research Institute, 31 F.3d 451, 456-57 (7th Cir. 1994). However,

> the Court went on to state that; "[t]he action that precipitates a constructive discharge, while it must be sufficiently harmful or offensive to make a reasonable employee consider remaining in the job impossible, need not itself be a materially adverse employment action, or indeed an employment action of any kind. If your supervisor tells you that he'll shoot you unless you resign "voluntarily," and you do, that's constructive discharge, though the threat itself is not an employment action of any sort." Id.

Until the decision in instant case, the U.S. Court of Appeals for the Tenth Circuit too seemed to be broadening its analysis of "adverse employment action" in various situations, as is evidenced by two recent Tenth Circuit cases, Thomas v. IBM, 48 F.3d 478 (10th Cir. 1995) and Jeffries v. Kansas, 147 F.3d 1220 (10th Cir. 1998).

For example, in Thomas, the Court found an "adverse employment action" where Plaintiffs's employer had merely given her two undistinguished annual reviews and a poor departmental ranking.

In Jeffries, based upon facts very similar to those in the instant case, the U.S. Court of Appeals for the Tenth Circuit found that Plaintiff had established an "adverse employment action" sufficient to find that the District Court erred in granting summary judgment on that issue. The Jeffries Court announced;

> "Ms. Jeffries has raised a genuine factual dispute on the question of whether she suffered "adverse employment action" as a result of

Dr. Outlaw's actions following her complaint to Ms. Stephens. In recognition of the remedial nature of Title VII, the law in this circuit liberally defines adverse employment action. See Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996). While the district court recognized that adverse employment actions cover "more than quantifiable losses of salary or benefits" , 946 F.Supp. At 1567, the court went on to cite a Seventh Circuit case holding an adverse employment action must be "material" in order to be actionable. See id. (citing Rabinovitz v. Pena, 89 F.3d 482, 488 (7th Cir. 1996))." Id. at 1232.

"The Tenth Circuit has never recognized such a "materiality" requirement and we decline to do so here. Rather, this court takes a case-by-case approach to determining whether a given employment action is "adverse." See, e.g., Corneveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498, 1507 (10th Cir. 1996)(showing of adverse employment action where employee required to "go through several hoops" in order to obtain severance benefits); Berry, 74 F.3d at 986-87 (showing of adverse employment action where employer reported plaintiff of suspected crime thereby creating risk of humiliation and damage to reputation); Sauers, 1F.3d at 1128 (showing of adverse employment action where plaintiff was reassigned against her wishes)." Id.

"In this case, Ms. Jeffries' assertion that,

immediately after she complained to the Hospital administration, Dr. Outlaw told her he would not supervise her as a student, issued repeated threats that her contract would not be renewed at the end of the year, and refused to supervise her as a student for the duration of her employment, is sufficient to raise a genuine factual dispute as to whether she suffered an adverse employment action in retaliation for her complaint." Id.

CONCLUSION

Based upon the foregoing, it is clear that the circuits are in disagreement when determining which unfortunate circumstances will be deemed to be "adverse employment actions", sufficient to allow employment discrimination cases to go to trial. The Circuit Courts are particularly at odds with the issue of whether a materiality requirement exists and if so, whether it exists in all situations or should only be used when the claim is retaliation.

In the case presently before this Court, Petitioner's testimony was the only testimony elicited in the case before the District Court entered its Summary Judgment. Petitioner's testimony was that she had suffered nearly two years of harassment after reporting to the Salt Lake MSC that the mail volumes had been inflated in the Magna, Utah Post Office prior to her appointment there. Petitioner testified that she was threatened with an unsatisfactory evaluation, long before her managers could have known the final outcome of her office's performance for the fiscal year, and that she was threatened with removal from office and offered an opportunity to step down to a lower grade at the same time. Petitioner then testified that she did, in fact, receive the threatened unwarranted, first "unsatisfactory" employment evaluation, the first in her 25 years with the postal service. Petitioner testified that after her unsatisfactory evaluation, she contacted her union representative, who in turn had a meeting with her manager, Misner. The union official later told her that he had informed Misner that Petitioner could not be removed from her office unless she was first retrained according to Management Training Instruction. Finally, Petitioner testified that Misner immediately devised an unprecedented training, which did not include either postal service training facilities or trainers, but which instead

required her to perform menial tasks in other post offices in the Salt Lake MSC, while observing managers whose style Misner apparently appreciated.

Given Petitioner's facts above, and the array of possible fact patterns throughout the circuits, where there have been findings of "adverse employment actions", particularly the fact pattern in the Tenth Circuit case of Jeffries v. Kansas, 147 F.3d 1220 (10th Cir. 1998), petitioners's case warranted a reversal of the U.S. District Court's judgment on the issue of adverse employment action and an opportunity to present her case in the U.S. District Court.

Petitioner respectfully requests that the U.S. Supreme Court grant her request for a Writ of Certiorari on the afore described issues.

/s/_____
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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

[Filed December 14, 1998]

Civil No. 2:95-cv-279W

MELINDA SEELY,
Plaintiff,

v.

MARVIN G. RUNYON, POST MASTER GENERAL, UNITED STATES POSTAL SERVICE,
Defendant.

JUDGMENT

The court has this date entered its Memorandum Decision and Order Granting Defendant's Motion for Summary Judgment, and in accordance therewith and pursuant to Federal Rule of Civil Procedure 58 and good cause appearing,

It Is Hereby Ordered and Adjudged that Plaintiff's first amended complaint is dismissed with prejudice with each of

the parties to bear their own costs.

DATED this 28 day of May, 1997.

BY THE COURT:

/s/_____
David K. Winder
Chief Judge

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of May, 1997, I served true and correct copies of the foregoing Judgment by United States Mail, postage prepaid, upon the following named counsel:

Linda D. Smith
LINDA D. SMITH, P.C.
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/s/_____
Norrine Gardiner
Secretary

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed December 14, 1998]

No. 97-4117
(D.C. No. 95-CV-279W)
(District of Utah)

MELINDA SEELY,
Plaintiff-Appellant,

v.

MARVIN G. RUNYON, Postmaster General, Untied States Postal Service,
Defendant-Appellee.

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3

Before PORFILIO, Circuit Judge, ANDERSON, Circuit Judge, and McWILLIAMS, Senior Circuit Judge

Melinda Seely ("Seely") was employed by the United States Postal Service in December, 1965, and thereafter continued such employment until October 2, 1992, when she elected to take "early out retirement." On March 27, 1995, Seely filed a "Verified Complaint" in the United States District Court for the District of Utah, naming as the defendant Marvin G. Runyon, Postmaster General, United States Postal Service.

On December 4, 1995, Seely filed a "First Amended Complaint." In that complaint, Seely stated that she is a resident of Salt Lake County, State of Utah, that she is "a female over the age of 40, and is not a member of the LDS religion, and is a member of a protected class pursuant to 42 U.S.C. § 2000(e)(2) and 29 U.S.C. § 623." Under the heading of "General Allegations," Seely set forth, in considerable detail, the chronology of events between herself and her supervisors, in particular, one David Meisner, which she said led to her "resignation" on October 2, 1992.

Based on her so-called "general allegations," Seely alleged three separate causes of action. The first two were based on violations of 42 U.S.C. § 2000(e)(2)(a), with the first being based on "[d]efendant's conduct in reassigning and demoting the plaintiff," which, according to Seely, was "motivated by the plaintiff's gender. . . ." The second cause of action, pursuant again to 42 U.S.C. § 2000(e)(2)(a), was also based on a reassignment and demotion, which she said was "motivated by [her] religion." The third cause of action

was based on 29 U.S.C. § 623, and in that cause of action Seely alleged that she had been reassigned and demoted, this time, because of her age. For those wrongs, Seely asked for general and special damages in an unspecified amount "to be proven at trial" and attorney's fees and costs.

On April 8, 1996, Runyon filed his answer to the first amended complaint, in which he either admitted or denied the various allegations contained therein, and affirmatively alleged that the Postal Service had not "discriminated against plaintiff in any prohibited way and had legitimate, non-discriminatory motives for its actions affecting her."

On March 21, 1997, after discovery, Runyon filed a motion for summary judgment. In that motion, counsel alleged that in her deposition Seely admitted that she had not been either reassigned or demoted and that "[w]ithout showing an adverse employment decision that affected her, plaintiff is unable to make a prima facie case of discrimination based on gender, age or religion."

On April 21, 1997, Seely filed a response to the defendant's motion for summary judgment.[1] In that response, counsel alleged that there was a "factual dispute regarding whether plaintiff was reassigned and/or demoted by the post office." Counsel went on to allege in her response that there had also been set forth in the First Amended Complaint numerous other acts of employment discrimination on the part

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[1] By this time Seely was represented by different counsel than the attorney who had filed her original and amended complaints, he having apparently moved from Utah.

of her supervisors, including threats, harassment, intimidation, and the like. And counsel then suggested in her response that under "notice" pleading, the factual allegations in the First Amended Complaint were sufficient to support a claim for "constructive discharge" and "retaliation," even though neither had been specifically pleaded in the First Amended Complaint. In connection with the latter, she also asked the court to allow her to amend the First Amended Complaint to "conform to the evidence." On May 5, 1997, the defendant filed a reply in opposition to Seely's response to his motion for summary judgment. This was the posture of the case when the district court, after hearing, granted the motion and dismissed the action with prejudice on May 28, 1997.

The district court's order granting defendant's motion for summary judgment appears as *Seely v. Runyon,* 966 F.Supp. 1060 (D.C. Utah 1997). In its order the district court noted that, because of supervisory dissatisfaction with Seely's job performance, she was temporarily reassigned to a 90-day retraining program, at which time she was to return to her former position, or a comparable one, and that her rate of pay, title, benefits, and the like, remained the same during the 90-day period. However, shortly before the 90-day period was to expire, Seely opted for an "early out" retirement. In this regard, as we understand it, Seely received a lump sum settlement as well as retaining certain insurance benefits. It would appear Seely has since accepted other employment. In any event, the district court concluded that Seely's 90-day assignment to a retraining program did not constitute "adverse employment action," as required by both 42 U.S.C. § 2000(e)(2)(a)(1) and 29 U.S.C. § 623(a)(1). In so doing, the district court cited, *inter alia, Williams v. Bristol-Myers*

Squibb Co., 85 F.3d 270 (7th Cir. 1996), where the Seventh Circuit spoke as follows:

> Obviously a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either. Otherwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit. The Equal Employment Opportunity Commission, already staggering under an avalanche of filings too heavy for it to cope with, would be crushed, and serious complaints would be lost among the trivial. *Id.* at 273-74 (citations omitted).

As to the suggestion that threats, harassment, and the like, added up to "adverse employment action," the district court held that "not everything that makes an employee unhappy is an actionable adverse action." *Seely v. Runyon*, 966 F. Supp. at 1064. It was on this general basis, then, that the district court granted Runyon's motion for summary judgment and dismissed the amended complaint with prejudice. At the same time the district court denied Seely's motion to amend to "conform to the evidence."

On appeal, counsel's basic argument is that the district court, in granting Runyon's motion for summary judgment, failed to view the record in a light most favorable to the non-

moving party, citing *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Further, counsel points out that in *Hardin v. Hussmann Corp.*, 45 F.3d 262, (8th Cir. 1995), the Eighth Circuit stated that summary judgments should only be used sparingly in employment discrimination cases. In this general connection, we note that the Supreme Court has stated that summary judgment is not a "disfavored procedural shortcut" but rather is an important judicial tool designed "to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986).

In any event, we are in substantial accord with the district court's disposition of the matter, and on that basis, we affirm. On the record before it, the district court concluded that as Seely indicated in her deposition, her assignment to a 90-day retraining program was not a demotion, there being no diminution of pay, status or benefits during the 90-day program. Nor do we believe that the interplay between Seely and her supervisors leading up to her decision to take early retirement rises to the level of adverse employment action. Bickering in the work place over employment practices between employees and supervisors is not new or novel, and is really quite common. And such does not constitute adverse employment action.

Further, counsel's motion to amend came very late in the day. The case had been on file some two years, counsel had filed one amended complaint, and it was only when counsel, faced with a possible adverse ruling on a summary judgment motion, sought to further amend. *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1091 (10th Cir. 1991). Also, in our view, the record, itself, does not support a claim

based on either "retaliation" or "constructive discharge." In this latter connection, Seely in her amended complaint merely stated that she "resigned." And the fact of the matter is that she, after consultation with her husband, decided to opt for early retirement.

Judgment affirmed.

ENTERED FOR THE COURT

Robert H. McWilliams
Senior Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

[Filed May 28, 1997]

Civil No. 2:95-cv-279W

MELINDA SEELY,	)
Plaintiff,	)
	)
v.	)
	)
MARVIN G. RUNYON, POST MASTER GENERAL, UNITED STATES POSTAL SERVICE,	)
Defendant.	)
	)

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the court on Defendant's Motion for Summary Judgment brought pursuant to Federal Rule of Civil Procedure 56(b). The court held a hearing on the motion on May 9, 1997. At the hearing, Jeannette F. Swent and Melinda Varszegi represented Defendant Marvin G. Runyon, and Linda D. Smith represented Plaintiff Melinda

Seely. Before the hearing, the court considered carefully the pleadings, memoranda, and other materials submitted by the parties. The court had also read certain of the authorities cited by each of the parties. Following oral argument, and after taking the motion under advisement, the court has further considered the relevant law and facts. Having now fully considered the issues in this case, and good cause appearing, the court enters the following memorandum decision and order.

I. BACKGROUND

For purposes of this motion for summary judgment, the court considers the following statement of facts to be true.

Plaintiff, an employee of the United States Postal Service since 1965, assumed the position of a Level-20 Postmaster in Magna, Utah, on March 12, 1990. Upon assuming that position, Plaintiff inherited a number of problems which she worked to solve. In particular, Plaintiff believed the office had a problem with mail volume inflation which she reported to management and attempted to correct.

In May 1991, Plaintiff met with Ken Prentiss ("Prentiss"), Salt Lake City Management Sectional Center ("MSC") Manager. During that meeting, Plaintiff attempted to describe the problems she had encountered at the Magna Post Office since her arrival, including her concerns with mail volume inflation. In response, Prentiss told Plaintiff that "two unsatisfactories and you' re removed from your office," and that she needed to "go back and count each piece of mail in her office." Plaintiff was shocked by Prentiss' statement,

especially in light of the fact that she had received a "very good" evaluation for her performance in Magna during fiscal year 1990.

Following that May 1991 meeting, Plaintiff was subjected to threats of removal and interference by the MSC in the management of the Magna Post Office. Plaintiff also claims she was subject to harassment and intimidation. Moreover, in the summer of 1992, David Misner ("Misner"), Director of Field Operations for the Salt Lake City MSC, removed Plaintiff from the Magna Post Office and sent her on a ninety-day training assignment in other area post offices.

During her temporary reassignment, Plaintiff spent almost two months with Bill Davis ("Davis") in the Sandy Post Office. The Sandy Post Office is a level 22 post office which is substantially more complex than the Magna Post Office. While in Sandy, Plaintiff did a lot of problem solving and provided Davis with a great deal of assistance, but also performed odd-jobs, beneath her Level EAS-20 ranking.[1]

Following her stay in Sandy, Misner refused Plaintiff's request to send her back to Magna and instead told Plaintiff to report to Bob Johnson ("Johnson"), the Postmaster in the Ogden Post Office. The Ogden Post Office is a Level 22 or 24 post office, and compared to the Magna Post Office, is much more complex. Plaintiff only spent one day in Ogden

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[1] Plaintiff often performed work beneath her Level EAS-20 ranking while working as the Postmaster in the Magna Post Office. For example, Plaintiff sorted mail and cleaned the toilets.

where Johnson gave her the choice of taking an assignment with work below her Level EAS-20 ranking or telling Misner that she refused to perform the assignment.

Plaintiff chose to take an assignment in the Ben Lomand Station. The Ben Lomand Station was a Level 18 station, several times bigger than the Magna Post Office, and fifty-two miles away from Plaintiff's home. Plaintiff chose to work in Ben Lomand where she was given a mixture of supervisor and postmaster responsibilities, including the ultimate responsibility of managing the office. Plaintiff spent less than two weeks in Ben Lomand, and on October 2, 1992, approximately three weeks before her ninety-day training assignment was to end, Plaintiff opted for an "early out" retirement. Plaintiff stated that she believed that if she had stayed in Ben Lomand for the remaining thirty days, she would have been sent back to the Magna Post Office.

During the temporary reassignment, and up until her retirement, Plaintiff retained her title as Postmaster, Magna Post Office. Moreover Plaintiff's salary and benefits were always based on that job title.

Plaintiff filed this lawsuit on March 27, 1995, and amended her complaint on December 4, 1995. Plaintiff's lawsuit consists of three causes of action: (1) a Title VII gender discrimination claim; (2) a Title VII religious discrimination claim; and (3) an Age Discrimination in Employment Act ("ADEA") claim. On March 21, 1997, Defendant moved for summary judgment on all three claims, arguing that Plaintiff's causes of action fail because she did not suffer any adverse employment action. In opposition to

Defendant's motion for. summary judgment, Plaintiff claims that she was subjected to adverse employment actions and that questions of fact preclude the relief requested by Defendant. The court will consider the parties' arguments below.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the court must construe all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1552 (10th Cir. 1997).

Once the moving party has carried its burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)); see also Gonzales v. Millers Cas. Ins. Co., 923 F.2d 1417, 1419 (10th Cir. 1991).[2] The non-moving party must "make a showing sufficient to establish the

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[2] The summary judgment motion may be "opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves." Celotex, 477 U.S. at 324.

existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

In considering whether there exist genuine issues of material fact, the court does not weigh the evidence but instead inquires whether a reasonable jury, faced with the evidence presented, could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Moya v. United States, 35 F.3d 501, 502-04 (10th Cir. 1994).[3] Finally, all material facts asserted by the moving party shall be deemed admitted unless specifically controverted by the opposing party. D. Utah R. 202(b) (4).

III. DISCUSSION

Plaintiff claims that Defendant discriminated against her on the basis of gender and religion in violation of Title VII,[4] and on the basis of age in violation of the ADEA.[5] To prevail on

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[3] "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient." Liberty Lobby, 477 U.S. at 252.

[4] Title VII makes it unlawful for an employer to "discriminate against any individual . . . with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a) (1).

[5] The ADEA makes it unlawful for an employer "to discriminate against any individual with respect to [her]

her claims, Plaintiff bears the initial burden of establishing a prima facie case of intentional discrimination.[6] See Thomas v. International Bus. Machs., 48 F.3d 478, 484 (10th Cir. 1995).

To establish a prima facie case for Title VII gender discrimination, Plaintiff must prove (1) she is within a protected class, (2) adverse employment action was taken against her, (3) she was doing satisfactory work at the time the adverse employment action was taken, and (4) comparable

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compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a) (1) .

[6] There are actually two methods for proving a defendant held the requisite discriminatory intent to violate Title VII or the ADEA. One, a plaintiff may present circumstantial evidence that indirectly proves the defendant's discriminatory motive in taking the adverse employment action. When a plaintiff chooses to indirectly prove the discriminatory motive, courts apply the burden-shifting analytical framework outlined by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). See MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437, 1441 (10th Cir. 1996); Thomas, 48 F.3d at 484. The McDonnell Douglas framework requires a plaintiff to initially establish a prima facie case of discrimination.

The alternative method for proving discriminatory intent is to present direct proof of that intent. In this case, Plaintiff has not presented such proof in response to Defendant's motion for summary judgment; therefore, the court will analyze Plaintiff's claims under the McDonnell Douglas framework as described above.

employees, not in the protected category, were not subject to comparable adverse employment action. See Love v. Angelo's Italian Foods, Inc., 87 F.3d 1170, 1174-75 (10th Cir. 1996); Cole v. Ruidoso Mun. Schs., 43 F.3d 1373, 1380 (10th Cir. 1994). Similarly, to establish a prima facie case for Title VII religious discrimination, Plaintiff must show (1) she was subject to adverse employment action, (2) she was doing satisfactory work at the time the adverse action was taken against her, and (3) some additional evidence to support her claim that Defendant took adverse action against her because Plaintiff did not share the religious beliefs of her supervisors. See Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033, 1038 (10th Cir. 1993). Finally, to state a prima facie case for age discrimination under the ADEA, Plaintiff must show (1) she is within a protected class, (2) adverse employment action was taken against her, (3) she was doing satisfactory work at the time the adverse employment action was taken, and (4) that a comparable employee who received more favorable treatment was substantially younger than Plaintiff. See O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1310 (1996); MacDonald, 94 F.3d at 1441; Thomas, 48 F.3d at 484-85.

The element common to all three cases is "adverse employment action." While Plaintiff must prove all of the above elements to ultimately succeed on her claims, the only issue now before the court is whether a reasonable jury could find that Plaintiff has suffered an adverse employment action.[7]

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[7] It should be emphasized that Defendant has sought summary judgment on only one basis: that Plaintiff has not suffered

In evaluating Title VII and ADEA discrimination claims, courts have made it clear that "'not everything that makes an employee unhappy is an actionable adverse action.'" Jeffries v. Kansas, Dep't of Social & Rehabilitation Servs., 946 F. Supp. 1556, 1567 (D. Kan. 1996) (quoting Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996)); see, e.g., Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997); Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 273-74 (7th Cir. 1996); Cole v. Ruidoso Mun. Schs., 43 F.3d 1373, 1381 (10th Cir. 1994); Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994). Instead, an actionable adverse action is one that affects the "'terms, privileges, duration, or conditions of employment.'" Yerdon v. Henry, 91 F.3d 370, 378 (2d Cir. 1996) (quoting Johnson v. Frank, 828 F. Supp. 1143, 1153 (S.D.N.Y. 1993)); see also 29 U.S.C. § 623(a) (1) (making it unlawful to discriminate with respect to "compensation, terms, conditions, or privileges of employment"); 42 U.S.C. § 2000e-2(a) (1) (same). Plaintiff alleges that Defendant took a number of adverse employment actions against her. Specifically, Plaintiff complains of threats of removal, harassment, intimidation, interference with her management of the Magna Post Office, and ultimately reassignment from the Magna office for ninety days for training in other offices. The court finds, for the reasons articulated below, that even viewing the facts in the light most favorable to Plaintiff, no reasonable jury could conclude that Defendant's actions constitute

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an adverse employment action. Thus, the court will not consider whether a reasonable jury could find that Plaintiff has established the remaining elements of her prima facie case.

actionable adverse employment actions under Title VII or the ADEA.

First, Defendant's threats of removal are not adverse employment actions because of their lack of consequence. In Mattern v. Eastman Kodak Co., the Fifth Circuit stated that the verbal threat of being fired is not an "ultimate employment decision" and does not "rise above having a mere tangential effect on a possible future employment decision." 104 F.3d 702, 708 (5th Cir. 1997). The Fifth Circuit reasoned that "[t]o hold otherwise would be to expand the definition of 'adverse employment action' to include events such as disciplinary filings, supervisor's reprimands, and even poor performance by the employee -- anything which might jeopardize employment in the future." Id. (emphasis in original). This court agrees with the Fifth Circuit that based on the language found in Title VII and the ADEA, such expansion is unwarranted. See also Cole v. Ruidoso Mun. Schs., 43 F.3d 1373, 1381 (10th Cir. 1994) (finding no adverse employment action where principal only stated that he would evaluate the plaintiff three times a year but did not carry the "threat" out).

Second, likes threats of removal, a reasonable jury could not find that the actions Plaintiff characterizes as "harassment," "intimidation," and "interference" constitute actionable adverse employment action under Title VII or the ADEA. To defeat Defendant's motion for summary judgment, Plaintiff must demonstrate a material adverse change in the terms or conditions of her employment. Plaintiff has failed to satisfy her burden. While Plaintiff cites to a number of instances where she felt "threatened," "embarrassed," or

"humiliated," by Defendant's actions, Plaintiff has failed to demonstrate how such actions effectuated a material change in the terms or conditions of her employment. Moreover, while the actions Plaintiff complains of as "interference" may have a tangential effect on her employment, they do not rise to the level of ultimate employment decisions meant to be actionable under Title VII or the ADEA. See, e.g., Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995) (affirming grant of summary judgment in favor of employer after finding the plaintiff's administrative complaints did not rise to the level of ultimate employment decisions); Flaherty v. Gas Research Inst., 31 F.3d 451, 456 (7th Cir. 1994) (holding a semantic change in title and a bruised ego did not constitute adverse employment action where pay and benefits remained the same) ck; Spring v. Sheboygan Area Sch. Dist., 865 F.2d 883, 836 (7th Cir. 1989) (finding "public humiliation" is not sufficient to establish age discrimination because "public perceptions were not a term or condition of [the plaintiff's] employment") ck; Bullock v. Windall, 953 F. Supp. 1461, 1473 (M.D. Ala. 1996) (stating plaintiff failed to demonstrate adverse employment action where he was not selected to attend a training course because Plaintiff failed to demonstrate how the non-selection affected the terms or conditions of his employment); Jeffries, 946 F. Supp. at pin (stating that "a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of responsibilities.").

Finally, the court finds, as a matter of law, that Plaintiff's ninety-day training reassignment does not constitute adverse employment action. Courts have generally held that absent a materially adverse change in the terms and conditions

of employment, a lateral transfer will not constitute an actionable "adverse employment action" for the purposes of Title VII or the ADEA. For example, in Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994), the plaintiff was reassigned but suffered no diminution in her title, salary, or benefits. The substance of her complaint was that the job to which she was reassigned involved fewer secretarial duties and was more stressful in that she had to watch the door, listen for the fax, and be in charge of security for people coming in and out of the area. The Eighth Circuit concluded that "[c]hanges in duties or working conditions that cause no materially significant disadvantage, such as [the plaintiff's] reassignment, are insufficient to establish the adverse conduct required to make a prima facie case." Id. The court concluded that the reassignment described by the plaintiff showed "nothing 'more disruptive than a mere inconvenience or an alteration of job responsibilities.'" Id. (quoting Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993)).

Likewise, in Joiner v. Ohio Department of Transportation, 949 F. Supp. 562, 566 (S.D. Ohio 1996), the plaintiff claimed that he experienced adverse employment action in that he lost the opportunity for overtime, was deprived of supervisory authority, and that his responsibilities were "significantly reduced." The court found that the fact that the plaintiff experienced some job changes was not enough to establish that he was subjected to adverse employment action. The court thus granted summary judgment to the employer because the plaintiff had presented no evidence that his working conditions were objectively intolerable to a reasonable person or that he experienced a

materially adverse change in the terms of his employment.

In this case, Plaintiff claims that her ninety-day training reassignment constituted adverse employment action. The court does not agree. While Plaintiff was reassigned, her reassignment was only temporary,[8] she suffered no loss in salary or benefits, and she retained the same job title. Furthermore, Plaintiff was reassigned to train in offices which were more complex than the Magna office and while in those offices, she engaged in "problem-solving" and in some postmaster duties. Moreover, even if Plaintiff performed some tasks below her Level EAS-20 ranking while in the Sandy and Ben Lomand offices, she often performed such tasks while working in the Magna Post Office; thus, there is no evidence that her job responsibilities were materially altered. Therefore, Plaintiff cannot survive Defendant's motion for summary judgment on her claim that the ninety-day reassignment was an adverse employment action. See also Crady v. Liberty Nat'l Bank & Trust Co. of Ind., 993

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[8] Plaintiff claims that there is a question of fact regarding the temporal nature of this assignment, but she points to no evidence which implies that the reassignment was going to be extended. Without specific evidence, the court cannot find that a question of fact exists. See Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1546 (10th Cir. 1995) ("To withstand a motion for summary judgment, 'the nonmovant must do more than refer to allegations of counsel contained in a brief . . . .'").

Furthermore, plaintiff testified that she thought she would have been returned to the Magna Post Office had she completed the assignment in Ben Lomand.

F.2d 132, 135-36 (7th Cir. 1993) (affirming summary judgment in favor of employer in ADEA case where plaintiff was transferred and given different responsibilities, but did not show the responsibilities were any less significant); Watts v. Kroger Co., 955 F. Supp. 674, 686-87 (N.D. Miss. 1997) (finding plaintiff's allegation that she was assigned duties she was not normally asked to perform did not constitute adverse employment action as a matter of law); Daulo v. Commonwealth Edison, 938 F. Supp. 1388, 1397-98 (N.D. Ill. 1996) ("[T]he court does not believe that a temporary shift transfer combined with a temporary retraining program-and nothing more-qualifies as adverse employment action."); Caussade v. Brown, 924 F. Supp. 693, 701 (D. Md. 1996), aff'd, 107 F.3d 865 (4th Cir. 1997) (granting employer's motion for summary judgment where plaintiff was transferred but did not suffer a material loss of prestige or a reduced opportunity for future reassignments or salary/grade increases); Kauffman v. Kent State Univ., 815 F. Supp. 1077, 1083-86 (N.D. Ohio 1993), aff'd, 21 F.3d 428 (6th Cir. 1994) (granting employer's motion for summary judgment where plaintiff's transfer was not "objectively intolerable to a reasonable person" and thus did not amount to an adverse employment action); Darnell v. Campbell County Fiscal Court, 731 F. Supp. 1309, 1313 (E.D. Ky. 1990), aff'd, 924 F.2d 1057 (6th Cir. 1991) ("[T]he clear trend of authority is to require that a transfer with no change in wages or benefits amount to a 'constructive discharge' to be actionable as an 'adverse employment action.'").

In sum, because Plaintiff has failed to establish that she suffered an "adverse employment action," an essential element of her prima facie case of discrimination, her Title

VII and ADEA claims must be dismissed.[9]

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[9] In addition, Plaintiff claims in her memorandum in opposition to Defendant's motion for summary judgment, that her first amended complaint alleges facts sufficient to put Defendant on notice of causes of action in addition to the three explicitly enumerated. Specifically, Plaintiff claims that she has sufficiently alleged a cause of action for retaliation. However, even assuming such a claim has been properly alleged, such does not save Plaintiff's claim from being dismissed on summary judgment. To state a claim for retaliation under Title VII, Plaintiff must establish that she was that subject of an adverse employment action. As the foregoing makes clear, Plaintiff has failed to make such a showing. Accordingly, Plaintiff's assertion that she has a claim for retaliation does not save her lawsuit from dismissal on summary judgment.

APPENDIX D

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21--CIVIL RIGHTS
SUBCHAPTER VI--EQUAL EMPLOYMENT OPPORTUNITIES

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Current through P.L. 104-150, approved 6-3-96

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

42 USCA s 2000e-2
42 U.S.C.A. § 2000e-2

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fall or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee

controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion or sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation,

association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C.A. § 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if--

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such

position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is

authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 USCA s 2000e-2
42 U.S.C.A. § 2000e-2

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful **employment** practice under this subchapter only if such role is adopted or applied with an intent to **discriminate** because of race, color, **religion**, **sex**, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful **employment** practice for a respondent, in connection with the selection or referral of applicants or candidates for **employment** or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, **employment** related tests on the basis of race, color, **religion, sex**, or national origin.

42 USCA s 2000e-2
42 U.S.C.A. § 2000e-2

(m) Impermissible consideration of race, color, **religion**, **sex**, or national origin in **employment** practices

Except as otherwise provided in this subchapter, an unlawful **employment** practice is established when the complaining party demonstrates that race, color, **religion**, **sex**, or national origin was a motivating factor for any **employment** practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an **employment** practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of **employment discrimination** under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had--

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present

objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order, or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to--

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the

due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

CREDIT(S)

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(Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109; Pub. L. 102-166, Title I, §§ 105(a), 106, 107(a), 108, Nov. 21, 1991, 105 Stat. 1074-1076.)

APPENDIX E

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 14--AGE DISCRIMINATION IN EMPLOYMENT

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Current through P.L. 104-150, approved 6-3-96

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(l) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

29 USCA s 623
29 U.S.C.A. § 623

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual,

member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would

cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section--

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631 (a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan--

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall, require or permit the involuntary retirement of any individual, specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of

subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter, or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub. L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the--

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control,

of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits--

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan--

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 41 l(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 41 l(b)(l)(H) of Title 26 and subparagraphs (C) and (D) of section 411 (b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411 (b)(1)(H) and 411 (b)(2) of Title 26.

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411 (a)(8)(B) of Title 26.

(9) For purposes of this subsection--

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of Title 26.

(j) Repealed. Pub.L. 99-592, § 3(b), Oct. 31, 1986, 100 Stat. 3342

(k) Date of adoption of system or plan

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(1) Minimum age requirements; early retirement benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section--

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because--

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for--

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age-

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501 (c)(17) of Title 26) that--

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)--

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban comers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)--

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.